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No. 381

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

ESTATE of ALBERT PATTERSON HUMPHREY, Deceased, JOE A. HUMPHREY, Independent Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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September, 1947

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—9-17-47—pp.

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Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit

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Joe A. Humphrey, Independent Executor of the Estate of Albert Patterson Humphrey, Deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 2, 1947, affirming a decision of the Tax Court of the United States.

Question Presented

The question presented is whether, where an irrevocable gift of money was made by a father to his adult son for the specific purpose of enabling the son to invest such money in a hazardous business venture, the funds were so employed, and substantial losses incurred during the father's lifetime, there may be in-

cluded in the gross estate of the decendent the total sum of the money so transferred, or must the amount included in decedent's gross estate because of such transfer, which has been determined to have been made in contemplation of death, be limited to the fair market value at the date of decedent's death of the property on hand at the date of death in which such transferred funds were invested?

Statutes and Regulations Involved

INTERNAL REVENUE CODE:

Sec. 811. *Gross Estate*

The value of the gross estate of the decendent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decendent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who

shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *

REGULATIONS 105:

Sec. 81.15. Transfers during life. The following classes of transfers made by the decedent prior to his death * * * are subject to the tax: (1) transfers in contemplation of death (see Sec. 81.16);

* * * * * * *

The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death * * *

Sec. 81.16. Transfers in contemplation of death. Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirecctly indicating the decedent's motive

in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

Statement

Albert Patterson Humphrey died testate February 23, 1942. The reported value of his estate for federal estate tax purposes was $185,475.00. On January 18, 1941, within two years prior to his death, the decedent and his wife each made cash gifts to one of their two sons of $40,000.00. The two sons were intending to, and shortly afterward did, engage in a speculative venture for which they needed more capital. The gifts referred to were made expressly to furnish such additional needed capital.

The two sons took the $80,000.00 given by their parents, combined it with $80,000.00 of their own, and paid the entire $160,000.00 into a partnership known as Humphrey Bros. The said $160,000.00 constituted the entire initial capital of the partnership Humphrey Bros. By their operations through the partnership Humphrey Bros., the two sons prior to their father's death had lost approximately one-half of the $160,000.00 initial capital of Humphrey Bros.

Under the foregoing state of facts, the Commissioner of Internal Revenue included the $40,000.00 transferred by decedent to one of his sons in the gross estate

of decedent and taxed it. The Tax Court sustained this action, finding that the $40,000.00 was, as a matter of fact, transferred in contemplation of death because the evidence not only did not rebut the statutory presumption stated in *Internal Revenue Code, Section 811(c)*, but the circumstances showed such contemplation. The Circuit Court of Appeals for the Fifth Circuit affirmed.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred in requiring that there be included in decedent's gross estate the sum of $40,000.00, being the amount of the cash gift by the father to his son, and in failing and refusing to limit the amount so included to one-fourth of the fair market value of the net assets of Humphrey Bros., a partnership, which did not exceed the sum of approximately $20,000.00.

Reasons for Granting Writ

The writ should be granted because the holding of the court below fails to properly interpret and apply the applicable provisions of the Internal Revenue Code and Treasury Regulations promulgated thereunder, and because the court below decided an important question of federal law which has not been, but which should

be, decided by this court. It is believed that the writ should issue to the end that there may be an authoritative decision of this Court upon the question involved.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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September, 1947

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No..... .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

ESTATE of ALBERT PATTERSON HUMPHREY, Deceased, JOE A. HUMPHREY, Independent Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief in Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

Opinion Below

The opinion of the Circuit Court of Appeals is reported at 162 F. 2d 1. The decision of the Tax Court of the United States was entered pursuant to memorandum findings of fact and opinion entered January 18, 1946, but not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered July 2, 1947. The jurisdiction of this Court is invoked under *Section 240 (a)* of the *Judicial Code*, as amended by *43 Stat. 938* (U.S.C., Title 28, Sec. 347).

Statutes and Regulations Involved

The Internal Revenue Statutes and Treasury Regulations involved are fully set out at pages 2 to 5 of the petition for certiorari, to which reference is hereby made.

Question Presented

The question presented is whether, where an irrevocable gift of money was made by a father to his son for the specific purpose of enabling the son to invest such money in a hazardous business venture, the funds were so employed and substantial losses incurred during the lifetime of the father, there may be included in the gross estate of the decedent the total sum of the money so transferred, or must the amount included in decedent's gross estate because of such transfer be limited to the fair market value of the property on hand at the date of decedent's death in which such transferred funds were invested?

Statement

The statement of facts contained in the petition for certiorari (pages 5 to 6, supra) sufficiently develops the salient facts. Reference to that statement is hereby made.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred in requiring that there be included in decedent's gross estate the sum of

$40,000.00, being the amount of the cash gift by the father to his son, and in failing and refusing to limit the amount so included to one-fourth of the fair market value at the date of decedent's death of the net assets of Humphrey Bros., a partnership, which did not exceed the sum of approximately $20,000.00.

Argument

In this proceeding the Tax Court determined a deficiency based upon including in decedent's gross estate the sum of $40,000.00, which action in turn was based solely upon the finding by the Tax Court that "decedent transferred by gift on January, 1941, the sum of $40,000.00 in contemplation of death" (R. 30). It made no finding that this sum was on hand in cash at the date of decedent's death, but on the contrary the record clearly establishes that the $40,000.00 in question, together with an additional $120,000.00, was paid into the partnership Humphrey Bros., and constituted the capital of that partnership. The record further discloses that much of the original capital of Humphrey Bros. (including necessarily a ratable part of the $40,000.00 here involved) had been dissipated prior to the death of Albert Patterson Humphrey and that the value of the assets of the partnership remaining at the date of his death was only a fraction of the partnership's investment therein. Under the findings of the Circuit Court of Appeals (R. 80), it is clear that a ratable part (one-fourth) of the fair market value of the assets of the partnership Humphrey Bros. remaining

on hand February 23, 1942, did not exceed approximately $20,000.00.

Section 811 (c) of the *Internal Revenue Code* and *Section 81.15* of *Treasury Regulations 105* provide that the value of transferred property includible in the gross estate of a decedent because such property was transferred in contemplation of or intended to take effect in possession or enjoyment at or after his death is the value thereof at the date of decedent's death. See also *Liebmann v. Hassett*, 148 F. 2d 247 (CAA-1st); *Heiner v. Donnan*, 285 U.S. 312, 330; and *Igleheart v. Commissioner*, 77 F. 2d 704, 711 (CCA-5th). As pointed out in *Igleheart v. Commissioner, supra*, such property transferred in contemplation of death for tax purposes "is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to the time of his death."

Since the rationale of the statute is that property transferred in contemplation of death is to be treated as though the transfer had not been made, and the transferred property had continued to be owned by the decedent up to the time of his death, cf., *Snyder v. Helvering*, 69 F. 2d 377, and *Schoenheit v. Lucas*, 44 F. 2d, 476, and as though the same had then been transferred by the decedent to his heirs, it follows as a necessary corollary that only the property *in the hands of the heirs* at the date of death, or the avails of property originally received by an heir as the result of a transfer

in contemplation of death, should be required to be valued and included in the decedent's gross estate.

A simple illustration will suffice to demonstrate the absurd results that might conceivably follow if the opinion of the court below be sustained. Let us assume that a father in contemplation of death transfers to an heir ranch or farming lands having a fair market value of $5,000.00 when transferred and that the heir sells such property for $5,000.00 in cash (its market value at the date of sale) during the transferor's lifetime. Then let us assume that during the lifetime of the transferor oil or gas is discovered by the vendee on the property with the result that at the date of decedent's death the property, now owned entirely by the vendee, no interest in which exists in the transferor or his transferee, is worth $500,000.00 and the transferor then dies.

Under the holding of the court below, there would be included in the gross estate of the decedent the sum of $500,000.00. Because, under the view of the court below, property transferred in contemplation of death, is to be valued and included in the gross estate of the decedent at its fair market value at the date of decedent's death, *regardless of the fact that the then owner of the property may be a total stranger to the decedent or his heirs.* We believe that no such consequence was intended by the Congress in enacting *Section 811(c)*

of the *Internal Revenue Code*. We respectfully assert, therefore, that the decision of the court below was erroneous.

Conclusion

It is respectfully submitted that the decision below is erroneous; deals with an important question of federal law that has not been, but should be, authoritatively decided by this Court, and that the petition for certiorari should be granted and the decision below reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 381

ESTATE OF ALBERT PATTERSON HUMPHREY, DECEASED, JOE A. HUMPHREY, INDEPENDENT EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 30–31) is not reported; the opinion of the Circuit Court of Appeals (R. 77–79) is reported at 162 F. 2d 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 2, 1947 (R. 77–79). The petition for a writ of certiorari was filed on October 1, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the circumstances, the courts below erred in sustaining the Commissioner's determination of the value, for estate tax purposes, of the gift which was made here in contemplation of death.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations will be found in the Appendix, *infra*, p. 8.

STATEMENT

There were several issues tried to the Tax Court in this case, among which was whether decedent Humphrey's gift of $40,000 to his sons, made within two years preceding his death, was a transfer "in contemplation of death" within the meaning of Section 811 (c) of the Internal Revenue Code. Appendix, *infra*, p. 8. The Tax Court held (R. 30) that it was such a transfer, and entered decision (R. 31) sustaining the Commissioner's determination (R. 14) that the $40,000 which was the subject of the transfer was includible in decedent's estate accordingly. No contention was made in the Tax Court that $40,000 was not the correct evaluation of the gift, assuming its inclusion to be proper; and the Tax

Court made no findings of fact with respect to value, nor any mention of the matter in its opinion. (R. 30–31, 78.)

In the Circuit Court of Appeals, where petitioner first questioned the correctness of the Commissioner's valuation figure, as well as there challenging the Tax Court's decision that the transfer in question was includible under the statute, the court, in sustaining both the determination of the character of the gift and the amount includible, stated (R. 78) that the evidence indicated "that the two sons took the $80,000 given by their parents [$40,000 of which was concededly the decedent's gift] and combined it with $80,000 of their own and by their operations prior to their father's death had lost about half of the $160,000 capital". The court concluded, however, that this loss was irrelevant in determining the value of the gift to be included in the decedent's gross estate.

The petitioner has now abandoned the issue with respect to the character of the transfer; his only contention on petition to this Court is that by reason of the transferees' subsequent loss of about half of their "composite" capital, the value of the includible property should be $20,000 instead of $40,000 as determined.[1]

[1] Actually there is no proof that half of the gift had been irretrievably lost. Indeed there is no showing of the fair market value of the assets of Humphrey Brothers or of the partnership interest acquired with the gift.

ARGUMENT

There is no occasion for further review of this case. The issue which petitioner raises was not raised in the Tax Court, and the record does not clearly indicate a factual basis for deciding it. In any event the issue as posed by the petitioner was correctly decided below, presents no conflict among the circuits, and, while the question is indeed a "novel" one, the answer is readily made, we submit, under well-established principles of law.

Section 811 (c) of the Internal Revenue Code and the concomitant Regulations (Appendix, *infra*, p. 8) provide that property transferred in contemplation of death, within the statutory meaning, shall be included in the decedent transferor's estate at its value as of the time of his death. The petitioner concedes (Pet. 12–13) that the rationale of the statute is that property transferred by the decedent during his lifetime in contemplation of death is to be regarded as having remained in his possession until his death. *Heiner* v. *Donnan*, 285 U. S. 312; *Snyder* v. *Helvering*, 69 F. 2d 377 (App. D. C.); *Schoenheit* v. *Lucas*, 44 F. 2d 476 (C. C. A. 4th); *Igleheart* v. *Commissioner*, 77 F. 2d 704, 711 (C. C. A. 5th). As was stated by this Court in *Milliken* v. *United States*, 283 U. S. 15, 22, by the 1916 Act, Congress adopted a well understood system of taxation on transfers at death, already in force in forty-two states, a

characteristic feature of which was to impose taxes on transfers made in contemplation of death, computed at the same rate and as if the property given had been a part of the donor's estate at his death.

Obviously the decedent himself did not dissipate the property and the improvidence of the donees in dissipating it cannot be attributed to him. The assumption must necessarily be made that had decedent not made the gift, the property would have remained intact in his possession until his death and would have passed as a result thereof. To deprive the gift of half its value because of the donees' improvidence would, however, require the conclusion that Congress meant its declared purpose in imposing a tax on gifts in contemplation of death to be thwarted in every case where the donee dissipates the property. There is no logical justification for such a result. We submit that the court below properly held that the fact that the donees dissipated the property was irrelevant in determining its value at the date of death.

The Regulations (Appendix, *infra*, p. 8) throw little, if any, light upon the subject. They do deal with additions and betterments to the property made by the donee, which enhance its value; and in that connection provide that the value of such additions or betterments should not

be taken into consideration. By a parity of reasoning, we think it may logically be said that detriment suffered in the value of the property due to the act of the donee, is likewise not to be taken into consideration.[2]

Moreover, petitioner has made no case even if, *arguendo,* his legal theory were sound. He asks, in effect, for a pro-rata sharing of the partnership losses between the Government's interest in the estate and the partner-heirs—and this on a wholly hypothetical assumption that the decedent's $40,000 gift was actually lost pro-rata with the other funds belonging to the co-partnership. The assumption is one we see no valid reason for making. It would be equally logical, we submit, if not more so on the facts of the case, to apply the "first money in, first money out" rule here, and to say that since the decedent's gift was admittedly (Pet. 5) "combined" with partnership funds already existing, it was those latter funds which were first spent and first lost. That would leave the decedent's gift quite intact, and therefore includible in his estate, even under the petitioner's own proposition.

[2] The hypothetical case put by petitioner (Pet. 13) obviously gives rise to questions vastly different from that here involved.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States * * *.
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.15.—*Transfers during life.*—
> * * *
>
> The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death, * * *. If the transferee has made additions to the property, or betterments, the enhanced value of the property due thereto should not be included.

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